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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1023. (+1029)

THE UNITED STATES, APPELLANT,

vs.

F. M. SYMONDS.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1023.

THE UNITED STATES, APPELLANT,

vs.

F. M. SYMONDS.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

F. M. SYMONDS
vs.
THE UNITED STATES. } No. 14469.

I.—*Petition.*—*Filed October* 13, 1884.—*J. R.*

To the honorable the judges of the Court of Claims:

The petition of F. M. Symonds respectfully shows to your honors:

That he is an officer of the United States Navy, to wit, a lieutenant, having been commissioned as such on the 21st day of March, 1871.

That heretofore, to wit, on the 15th day of March, 1882, the following order was issued to claimant:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
Washington, D. C., March 15, 1882.

SIR: Proceed to Newport, R. I., and report to Commodore Luce, on the 1st of April next, for duty on board the U. S. training-ship New Hampshire.

By direction of the Secretary of the Navy:

J. G. WALKER,
Chief of Bureau.

Lt. F. M. SYMONDS,
Ogdensburg, N. Y.

2 That in obedience to said order, your petitioner proceeded to Newport, R. I., and did report, as directed, on April 1, 1882, and that since that time he has been serving upon the said U. S. training-ship New Hampshire.

Your petitioner further shows that the said U. S. training-ship, New Hampshire, was put in commission, on sea service, at Norfolk, Va., on or about the 1st day of August, 1881, and was ordered to proceed to Newport, R. I., for duty in the U. S. training fleet.

That since the arrival of said vessel at Newport, R. I., she has been attached to said training fleet.

Your petitioner further shows that since the date said vessel was put in commission on sea service at Norfolk, Va., as aforesaid, she has been at various times and is now, under the direction of the Secretary of the Navy, the flag-ship of said squadron, and has served as such since the 14th day of February, 1883, with headquarters in Narragansett Bay.

And your petitioner further shows that all of the officers attached to said ship during her service, as aforesaid, down to and including the 31st day of July, 1882, received the sea pay allowed by law for their respective grades; and that your petitioner, from the date of his attachment to said vessel as aforesaid, to wit, the 1st day of April, 1882, down to and including the said 31st day of July, 1882, received the sea pay of a lieutenant, after five years of service as such, to wit, at the rate of $2,600 per annum as pay proper, and in addition thirty (30) cents a day as ration money; but that since said 31st day of July, 1882, he has only been al-

lowed by the accounting officers of the Treasury, and in fact has only received, pay at the rate of $2,200 per annum, that being the pay of a lieutenant after five years of service as such when on shore duty.

Your petitioner further shows that since said 1st day of April,
3 1882, he has had his quarters upon said vessel, and has done duty thereon, and that he has at all times performed the same character of duty.

In view of the foregoing, your petitioner prays judgment in the sum of eleven hundred ($1,100) dollars.

Your petitioner further shows that he is the sole owner of this claim; that he has made no assignment of any portion thereof; that he has at all times borne true allegiance to the Government of the United States, and has never in any way given aid, comfort, or assistance to rebellion against said Government; and that he has appointed John Paul Jones, of Washington, D. C., his attorney for the prosecution of this claim.

F. M. SYMONDS,
Lieutenant, United States Navy.

UNITED STATES OF AMERICA,
STATE OF RHODE ISLAND,
County of , *ss:*

Be it known that on the sixth day of October, one thousand eight hundred and eighty-four, before me personally appeared F. M. Symonds, lieutenant U. S. Navy, above named, who is to me known to be the person described in and who executed the above instrument.

In testimony whereof, I have hereunto subscribed my name the day and year last above written.

LAMTON COGGESHALL,
Notary Public.

Witnesses:
THOMAS J. COWIE.
L. C. LOGAN.

(Endorsed:) No. 14469. F. M. Symonds vs. The United States. Original petition. Filed October 13, 1884. J. R. John Paul Jones, att'y of record, 458 La. ave.

4 II.—*General traverse.*—*Filed Dec.* 19, 1884.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 III.—*Motion for leave to amend petition.—Filed and allowed May 11, 1885.*

Comes now the claimant, by John Paul Jones, his attorney, and prays the court for leave to amend his petition as follows:

Strike out the clause on page 3 containing the prayer for judgment, and insert the following:

"Your petitioner claims thirty cents per diem ration money and difference between sea and shore pay from August 1st, 1882, to October 13th, 1884, under sections 1556, 1571, 1578, and 1585, United States Revised Statutes, and prays judgment in the sum of $1,123.70."

Also that the printing of the petition as amended be dispensed with.

JOHN PAUL JONES,
Attorney for Claimant.

Allowed, May 11, 1885.

W. A. R., *C. J.*

6 IV.—*Findings of fact and conclusions of law.*

FINDINGS OF FACTS.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

Claimant was a lieutenant in the United States Navy of more than five years' standing during all the period covered by this claim.

II.

On March 15, 1882, claimant was ordered to report on board the United States training-ship New Hampshire for duty, and did so report on the 1st day of April, 1882. Since that time he has performed the duties of executive officer of said vessel, which said duties are similar to those of executive officers on cruising ships, and in addition to these general duties he has had others, which were more exacting and more arduous than those on board of any other class of ships in the Navy, whether cruising ships or not.

III.

Said duties and the character of the service of the claimant have remained the same since the date he reported for duty on said vessel.

IV.

During the time he was attached to said vessel claimant was required to have his quarters on board, and was obliged to wear his uniform, to mess there, and was not permitted by the rules of the service to live with his family.

V.

Since the date when claimant reported on board the New Hampshire she has been located in Narragansett Bay, and most of the time has been the flag-ship of the training squadron.

VI.

On June 30, 1881, the Secretary of the Navy issued the following order:

NAVY DEPARTMENT,
Washington, June 30, 1881.

SIR: You are authorized to enlist officers' stewards and cooks and servants for the New Hampshire such as are allowed for a vessel with her complement of officers. The officers of the New Hampshire will be considered as attached to a vessel commissioned for sea service the same as other apprentice training vessels.

WM. H. HUNT,
Secretary of the Navy.

Capt. P. C. JOHNSON,
Com'd'g U. S. S. New Hampshire, Norfolk, Va.

(Rec., p. 8.)

7 VII.

There was no change in the status of the ship on or after August 1, 1882, but her equipment and complement of officers remained that of a cruising ship.

VIII.

From April 1, 1882, to July 31, 1882, claimant was allowed sea pay and commutation of rations at thirty cents per day.

IX.

From and after August 1, 1882, claimant has been allowed only the shore pay of an officer of his grade, and has neither been allowed a ration nor commutation therefor.

X.

The commodore commanding the United States training fleet received only shore pay after August 1, 1882, whilst the officers serving under his command on the Portsmouth, Saratoga, and Jamestown received sea pay.

The Portsmouth, Saratoga, and Jamestown are cruising ships that go out to sea.

XI.

July 7, 1882, Mr. Secretary Chandler issued the following order:

[General Order No. 297.]

NAVY DEPARTMENT,
Washington, July 7, 1882.

On and after 1st of August next the New Hampshire, the Minnesota, the Intrepid, and the Alarm will not be considered in commission for sea service.

WM. E. CHANDLER,
Secretary of the Navy.

XII.

The New Hampshire has remained in the same place in which she was anchored July 1, 1882. She is not in a condition for cruising. She is a sailing vessel, has on board sails, spars, and tackle. She could be sailed out to sea, but it would not be advisable, as it would be dangerous.

XIII.

Navy regulations for 1876:

"Duty on board a sea-going vessel of the Navy in commission, on board a practice ship at sea, or on board a coast-survey vessel actually employed at sea, will be regarded by the Department as sea service."

CONCLUSIONS OF LAW.

Upon the foregoing facts the court finds as conclusions of law that the claimant is entitled to recover the sum of .

V.—OPINION.

WELDON, J., delivered the opinion of the court:

It is alleged in the petition of claimant that he is an officer of the United States Navy, to wit, a lieutenant, having been commissioned as such on the 21st of March, 1871; that on the 15th of March,
8 1882, he was ordered by the Secretary of the Navy to duty on board the United States training-ship New Hampshire; that in obedience to such order he reported as directed on April 1, 1882; that from that time to the filing of the petition he served on board said ship; that said ship was put in commission on sea service in August, 1881, and was ordered to proceed to Newport, R. I., for duty in the United States training fleet; that since the time said ship was put on sea service at Norfolk she has at various times, and is at the time of bringing the suit, under the direction of the Secretary of the Navy, the flag-ship of the squadron, and served as such from the 14th of February, 1883, with headquarters in Narragansett Bay; that up to July 31, 1882, and from the said 1st day of April, 1882, petitioner received the sea pay of a lieutenant, after five years' service, to wit, at the rate of $2,600 per annum, and in addition 30 cents per day as ration money; but that since that time he has been allowed at the rate of $2,200, as on shore duty. He brings this suit to recover the difference between the pay allowed for sea and shore duty under section 1556, Rev. Stat.

The material allegations of the petition are sustained by the findings, but, in addition thereto, it is shown that on the 7th day of July, 1882, the Secretary of the Navy issued General Order No. 297, as follows:

"On and after the 1st of August next, the New Hampshire, the Minnesota, the Intrepid, and the Alarm will not be considered as in commission for sea service."

The claimant received pay for sea service until this order took effect, and thence to the bringing of this suit the Department recognized him as performing shore duty and service, and he has been paid accordingly. The

Government contends that the legal effect of that order is to determine the character of the service, and place him in such relation to the Department as that he can only claim by law the compensation of a lieutenant on shore duty.

The issue thus marked involves the construction of a portion of section 1556, which provides as follows:

"Lieutenants after five years from such date when at sea, $2,600; on shore duty, $2,200; on leave or waiting orders."

In connection with a construction of this statute is involved the question, whether the Secretary of the Navy has power, under sec. 1547, Rev. Stat., to determine by orders the character of the service, and thereby fix the compensation of the officer. We will consider the power of the Secretary under section 1547, and the construction of the statute providing compensation for the performance of services at sea and on shore.

It is insisted by the Assistant Attorney-General that the Supreme Court has settled the question in favor of the right of the Secretary to determine by order the kind of service, and thus fix the emolument of the officer without reference to the character of the service he performs. Two decisions are cited to sustain the position assumed in the contention of the Government: The case of Gratiot vs. The United States, reported in 4th Howard, p. 80; and the more recent case of Ex parte Reed, reported in 100th U. S., page 13.

In the Gratiot case the Supreme Court says:

"The Army regulations, made pursuant to the authority conferred by Congress, have the force of law."

And in the Reed case it is said:

"The regulations for the administration of law and justice in that service, established by the Secretary of the Navy, with the approval of the President, have the force of law."

9 By an examination of the cases relied on by the Government, it will be seen that the regulations referred to in both these cases were in relation to a different subject-matter than the one embraced in the regulation in the case at bar. In the Reed case it had reference to the "administration of law and justice," a mere mode of proceeding which had not been provided for by the statute, but was left to the discretion of the Secretary of the Navy, subject to the approval of the President.

The "orders, regulations, and instructions issued by the Secretary of the Navy," under section 1547, Revised Statutes, must be in pursuance of law upon a subject-matter which the law has not determined, adjusted, or defined. In the Gratiot case the Supreme Court says:

"The Army regulations under which General Gratiot was removed from West Point to Washington were authorized by law, and his brevet rank did not release him from discharging the duties of his commission proper."

It may be assumed as a fundamental proposition that every regulation of an Executive Department of the Government must be in conformity to law, when a law exists upon the subject of the regulation. The legislative will, as expressed in the statute, made in pursuance to the constitutional power of Congress, is the supreme law of the land, binding alike on the officer and citizen. Conceding that the order of the 7th of July, 1882, was intended to reduce the pay of the claimant from $2,600 to $2,200, the

question arises: Had the Secretary of the Navy the power to change the character of the service as recognized by the construction of the order of the 15th of March, 1882, to the character of service as recognized by the order of the 7th of July?

The question presented by the statement is to be answered by a construction of the latter part of section 1556, already quoted. The dispute in this case does not refer to a matter affecting the mere regulation of the Navy—something which must be left to a discretion, a mere convenience, that tends to discipline, efficiency, and order of the public service; but it relates to the pay of an officer, a subject-matter not falling within the necessity of an "order, regulation, or instruction" of the Secretary of the Navy.

The pay of a public officer, whether civil or military, must be regarded as a subject on which Congress will necessarily legislate, unless, in the use of the power, they may impair the efficiency of a Department in the exercise of functions peculiarly executive. The regulations of the Army and the regulations of the Navy,are given the force of law when they apply to mere detail of service which has not been regulated by positive enactment. It is provided in the latter clause of section 1556 that lieutenants shall receive, "when at sea, two thousand six hundred dollars," and section 1571, R. S., provides:

"No service should be regarded as sea service except such as are performed at sea, under the orders of a Department, and the vessels employed by authority of law."

The service sued for in this case was performed under the order of the Navy Department, and was regarded, until August 1, 1882, as sea service within the meaning of the statute. The character of the service performed before said date was identical in fact with the service performed afterward; but it is insisted that the order of the Secretary changing the commission as to service, changed in law the character of the service.

The findings show that the claimant performed the duties of an executive officer, which duties are similar to those of executive officers on board a cruising ship; that during the time he was required to have his quarters on board the vessel, to wear his uniform, and was not permitted by the rules of the service to live with his family. The duty which the petitioner performed on board the training-ship was more arduous than duty on board a ship while sailing on the ocean or in foreign seas.

Section 1571 defines what is regarded as sea service, "service performed at sea." The term "at sea" is not without judicial and executive construction. The ship New Hampshire, during the time covered by the claim, was in Narragansett Bay, an arm of the sea where the tide ebbs and flows. This we assume upon the authority of the case of Peyroux et al. vs. Howard & Vanan (7 Pet., 342).

In the case of De Lovi vs. Boit, decided by Justice Story, it is said:

"In fact, what is 'the sea' or 'the high sea' has nothing to do with the bounds of counties, but it is ascertained by high and low water mark on the sea-coast, and by a parity of reasoning it should be the same in ports and havens." (2 Gallison, 428.) "Sea service," "duty at sea," "performed at sea," became the subject of executive construction in the Attorney-General's Department, and is reported in 10 Ops., 192.

"'Duty at sea,' then, is service 'performed at sea.' But when does this service begin? I do not think it a fair construction to say that it begins only when the vessel leaves her port and goes to sea. If the words are to receive a literal construction, it cannot be said that a vessel is 'at sea' when lying in a port on her cruise, or even when proceeding up or down the Delaware or Potomac River. Captain Foote's gunboats, on the Tennessee and Cumberland Rivers, are not literally 'at sea,' and yet it would hardly be a safe construction to say that the service which he and his officers have recently performed with them on those rivers is not 'duty at sea,' within the meaning of this act. A mere literal construction must, therefore, be discarded, and we are to adopt the one most in accordance with reason and justice."

Congress, for reasons which will most readily occur to every person, have made a distinction in pay between the officer at sea and on shore, and if the claimant, by the character of the service and his situation with reference to the performance of his duties, comes within the clause "at sea," as used in section 1556, and explained in section 1571, then he is entitled to recover on the theory of his petition.

The words "at sea" and "performed at sea," as used in the statutes, do not mean on the "high sea" beyond the sight of land, but upon the waters of the sea subjected to such restrictions, regulations, and requirements as are incident to service at sea. When the claimant was ordered by the Department on board the ship New Hampshire to perform the duties performed by him, as shown by the findings, he became "at sea;" he was then in the performance of duties "at sea" within the meaning of section 1571, and his right of pay attached under section 1556, beyond the power of the Secretary to change as long as the elements of the service continued as marked by the character of the duties.

The legal essence of things cannot be changed by a mere name—by the volition of an executive officer in the discharge of executive duty. Section 1571 was intended by Congress to define what is sea service, and it is not reserved to the Secretary of the Navy to perform that duty by regulation. If the section does not perform the function of definition in the clearest light, it is reserved to courts (which must ultimately construe the law) to gather, if possible, the purpose and will of the legislature from the best and highest sources of information.

By section 1571 the concurrence of two conditions is required to constitute sea service: First, they must be performed at sea; second, they must be under the orders of a Department, and in vessels employed by authority of law. We have already determined that the ship of the claimant, situated as it was with reference to the claimant, was "at
11 sea." The duties which the claimant performed were under the orders of the Department, made in April, 1882, and continued in force from that time to the beginning of this suit. It is true that on the 7th of July, 1882, the order of the Secretary of the Navy sought to change the legal effect of the services performed on the part of the claimant; but the order to perform the particular service remained in force in all its legal integrity as given by the Secretary at the commencement of the service.

The judgment of the court is that the petitioner recover the sum of $.

12 VI.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 29th day of March, A. D. 1886, judgment was ordered to be entered up as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said F. M. Symonds do have and recover of and from the United States the sum of one thousand one hundred and twenty-two $\frac{29}{100}$ dollars ($1,122.29).

13 VII.—*Application for and allowance of appeal.—Filed April 13, 1886.*

From the judgment rendered in the above-entitled cause on 29th of March, 1886, in favor of claimant, the defendants, by their Attorney-General, on the 13th day of April, 1886, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Ass't Attorney-General.

Filed April 13, 1886.

And now, to wit, April 13, 1886, the appeal is allowed as prayed for.

WM. A. RICHARDSON,
Chief Justice.

14 In the Court of Claims.

F. M. SYMONDS
vs.
THE UNITED STATES. } No. 14469.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendnts for the allowance of appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this eighth day of September, 1886.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsement on cover:) No. 1023. The United States, appellant, vs. F. M. Symonds. Court of Claims. Filed September 27, 1886.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1029.

THE UNITED STATES, APPELLANT,

vs.

JOSHUA BISHOP.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1029.

THE UNITED STATES, APPELLANT,

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JOSHUA BISHOP.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

JOSHUA BISHOP
vs.
THE UNITED STATES. } No. 14710.

I.—*Petition.*—*Filed Nov.* 24, 1885.

To the honorable the judges of the Court of Claims:

The petition of Joshua Bishop respectfully shows to your honors that he is a lieutenant commander in the United States Navy, having been commissioned as such on the 13th day of July, 1870.

That heretofore, to wit, on the 17th day of April, 1884, he was ordered by the proper authorities to report for duty upon the U. S. S. Minnesota one of the U. S. training fleet, and that he did so report upon the day of , 1884, and that he has been serving upon her ever since.

Your petitioner further shows that said vessel is employed by authority of law, and that the service performed by him, your said petitioner, was performed at sea, under the orders of a Department, and that under section 1571, R. S., he should have been paid the pay of a lieutenant commander after four years from date of commission, viz, $3,000, but that he has only been allowed and paid the shore-pay of a lieutenant commander after four years from date of commission, viz, $2,800.

Your petitioner further says that, under sections 1578 and 1579, R. S., he has been during all of the time of his service on board of the Minnesota entitled to a ration, or commutation thereof, at thirty cents per day, bu that the same has been denied him.

2 Wherefore your petitioner asks judgment in the sum of $

Your petitioner further shows that he is the owner of this claim that he has never borne arms against the U. S. Government, or given aid or comfort to rebellion, and that he has appointed John Paul Jones, of Washington, D. C., his attorney for the prosecution of this claim.

JOSHUA BISHOP,
Per JOHN PAUL JONES,
His Attorney.

DISTRICT OF COLUMBIA, *ss:*

John Paul Jones, being first sworn, says he is the attorney of Joshua Bishop, and that the matters stated in the foregoing petition are true to the best of his knowledge and belief.

JOSEPH W. AMAN,
Com'r Court of Claims.

3 II.—*General traverse.*—*Filed Dec.* 12, 1885.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given

encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

4 IV.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

The claimant is a lieutenant commander in the United States Navy, of more than four years' service as such, and is now serving in the U. S. S. Minnesota, having reported for duty on board of her on the 18th day of April, 1884, in obedience to orders from the proper authority.

II.

Claimant has only been paid the shore-pay of a lieutenant commander of more than four years' service since that date, and no allowance has been made him of rations or for commutation thereof.

III.

The U. S. S. Minnesota is one of the training ships of the United States Navy, and has been such for more than ten years last past. She has been since the time this claim accrued stationed in New York Harbor, and cruises and moves about under her own power. Her machinery and equipment are kept in perfect order, and she is perfectly sea-worthy, and could at any time, if so ordered, within the time allowed vessels of her class, be in readiness to start upon a protracted cruise.

IV.

Prior to October 1, 1882, the officers attached to her received sea-pay and credit for sea-service for the time they were so attached, and commutation of rations, and after that the officers received only shore-pay and no rations or commutation thereof.

V.

The duties of the officers attached to training ships are more arduous and confining than those of officers of similar grade upon vessels in foreign waters.

VI.

The claimant was the executive officer of the Minnesota, and not only had to perform the regular and usual duties of executive officer, but also had other duties arising from the peculiarities of the training-ship service.

5 VII.

Claimant reported for duty on board said ship April 19, 1884, pursuance of the following order:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
Washington, April 17, 1884.

SIR: Report to Commodore Fillebrown, without delay, for duty as executive of the U. S. training ship Minnesota.

This employment on shore duty is required by the public interest, and such service will continue until 17th April, 1887, unless it is otherwise ordered.

By direction of the Secretary of the Navy:

Respectfully,

J. G. WALKER,
Chief of Bureau.

Lieut. Com. JOSHUA BISHOP,
United States Navy, New York.

[General Order 297.]

NAVY DEPARTMENT,
Washington, July 7, 1882.

On and after the 1st of August next, the New Hampshire, the Minnesota, the Intrepid, and the Alarm will not be considered in commission for sea-service.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as conclusion of law, that the plaintiff is entitled to recover the sum of $816.58.

OPINION.

WELDON, J., delivered the opinion of the court:

This case, embracing as it does substantially the same facts as the case of Symonds, was submitted in connection with that case.

In the Symonds case it was insisted that the ship was not in a condition to perform all the duties of sea-service, and therefore could not in law be engaged in that service, but in this case the character and condition of the ship eliminates that question as a point in controversy. The court having in the Symonds case adjudicated principles of law which embrace in legal effect the facts of this case, it is the judgment of the court that the petitioner recover from the defendants the sum of $816.58.

6 V.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 29th day of March, A. D. 1886, judgment was ordered to be entered up as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said Joshua Bishop do have

and recover of and from the United States the sum of eight hundred and sixteen $\frac{58}{100}$ dollars ($816.58).

7 VI.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 29th day of March, 1886, in favor of claimant, the defendants, by their Attorney-General, on the 13th day of April, 1886, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Asst. Attorney-General.

Filed April 13, 1886.

And now, to wit, April 13, 1886, it is ordered by the court that the appeal be allowed as prayed for.

WM. A. RICHARDSON,
Chief Justice.

8 In the Court of Claims.

VII.

JOSHUA BISHOP
vs.
THE UNITED STATES. } No. 14710.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foreging are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for the allowance of appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this eleventh day of September, 1886.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

(Indorsement on cover:) No. 1029. The United States, appellant, vs. Joshua Bishop. Court of Claims. Filed September 27, 1886.

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In the Supreme Court of the United States

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANT,
vs.
F. M. SYMONDS.
} No. 1023.

STATEMEET, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANT,
vs.
F. M. SYMONDS. } No. 1023.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This is an appeal from a judgment rendered by the Court of Claims in favor of F. M. Symonds against the United States on the 29th of March, 1886, for the sum of $1,122.29.

F. M. Symonds, the claimant in court below, a lieutenant in the Navy of more than five years' standing, was, on the 15th of March, 1882, ordered to report on board the United States training ship New Hampshire, in Narragansett Bay, for duty, and did so report on the 1st of April following. At that time the officers of the New Hampshire, by virtue of an order of the Secretary of the Navy, were attached to a vessel commissioned for sea-service, the same as other apprentice-training vessels (Rec., p. 4).

July 7, 1882, Mr. Secretary Chandler issued the following order (Rec., p. 4).

[General Order, No. 297.]

NAVY DEPARTMENT,
Washington, July 7, 1882.

On and after 1st of August next the New Hampshire, the Minnesota, the Intrepid, and the Alarm will not be considered in commission for sea service.

WM. E. CHANDLER,
Secretary of the Navy.

Prior to the issuance of the above order, claimant was allowed sea pay and a commutation of rations; subsequent to the order, although there was no change in the status of the ship, her equipment and complement of officers remaining substantially the same, he was allowed shore pay for an officer of his grade without any commutation of rations.

During the period of his service aboard the New Hampshire that vessel was practically unseaworthy. She had on board sails, spars, and tackle, but could not, without danger, be sailed to sea.

The order of the Secretary putting her out of commission for sea service did not in any way affect the duty to be performed by claimant. During the time he was attached to said vessel he was required to have his quarters on board, was obliged to wear his uniform, and to mess there.

Under the above state of facts, judgment was rendered by the Court of Claims, allowing claimant the full sea pay to which a lieutenant in the Navy five years after the date of his commission is entitled, and also to the commutation of one ration.

The statutes applicable to this case are as follows:

Clause in section 1556, Revised Statutes:

> Lieutenants during the first five years after date of commission, when at sea, two thousand four hundred dollars; on shore duty, two thousand dollars; on leave or waiting orders, one thousand six hundred dollars after five years from such date, when at sea, two thousand six hundred dollars; on shore duty, two thousand two hundred dollars; on leave or waiting orders, one thousand eight hundred dollars.
>
> SEC. 1571, R. S. No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department, and in vessels employed by authority of law.
>
> SEC. 1578, R. S. All officers shall be entitled to one ration, or to compensation therefor, while at sea or attached to a sea-going vessel.

Navy Regulations for 1876:

> Duty on board a sea-going vessel of the Navy in commission, on board of a practice ship at sea, or on board a Coast Survey vessel actually employed at sea, will be regarded by the Department as sea service.

This case involves not only the legality of the above-cited order, but the power of the Secretary of the Navy, always heretofore recognized, to place a naval vessel in or out of commission.

ASSIGNMENT OF ERRORS.

The court erred—

(1) In finding as a conclusion of law, based upon the facts as found, that the claimant is entitled to recover the sum of $1,222.29.

(2) In deciding upon the facts, as stated, that any amount is due claimant.

(3) In holding, viz:

> When the claimant was ordered by the Department on board the ship New Hampshire, to perform the duties as performed by him, as shown by the finding, he became at sea, he was then in the performance of his duties at sea within the meaning of section 1571, and his right of pay attached under section 1556, beyond the power of the Secretary to change as long as the elements of the service continued as marked as the character of the duties (p. 8).

(4) In holding, viz:

> Section 1571 was intended by Congress to define what is sea service, and it is not reserved for the Secretary of the Navy to perform that duty by regulation. If the section does not perform the function of definition in the clearest light, it is reserved to courts (which must ultimately construe the law) to gather, if possible, the purpose and will of the legislature from the best and highest sources of information (p. 8).

(5) In holding that "sea service" is entirely dependent on the character of the service rendered, whether the vessel be in commission or not, as follows, viz:

> It is true that on the 7th of July, 1882, the order of the Secretary of the Navy sought to change the legal effect of the services performed on the part of the claimant; but the order to perform the particular service remained in full force in all its legal integrity as given by the Secretary at the commencement of the service (p. 8).

(6) In holding, viz:

> The dispute in this case does not refer to a matter affecting the mere regulation of the Navy—some-

thing that must be left to discretion, a mere convenience that tends to discipline, efficiency, and order of the public service, but it relates to the pay of a public officer, a subject-matter not falling within the necessity of a regulation.

BRIEF OF ARGUMENT.

If the court below is correct in the holding that under the facts of this case, claimant, when ordered on board the New Hampshire, was "in the performance of duties 'at sea' within the meaning of section 1571, and his right of pay attached under section 1556, beyond the power of the Secretary to change as long as the elements of the service continued as marked by the character of the duties," it follows as a necessary sequence that all existing regulations pertaining not only to training ships, but also those of like character to receiving ships, revenue and merchant vessels, practice ships, vessels on the Coast Survey, and any other vessel in the employ of the Government, are illegal, void, and of no effect. If such opinion is sustained by this court, then the question of pay of all naval officers is entirely dependent upon the character of the duty performed, and not by reason of their being attached to a vessel in or out of commission, as has always been recognized by the Department.

Such construction of the law is entirely contrary to the whole theory of the naval establishment. The power of the Secretary of the Navy to determine the character of the service upon which a vessel shall be employed, has always been recognized and enforced. In no period of

our naval history has an officer been regarded as on "sea service" and entitled to sea pay, except when attached to a vessel under commission for sea service.

In the regulations of the Navy Department, owing to the exigencies of the service, the literal meanings neither of "at sea" nor "sea service" have been unqualifiedly observed. "At sea," by reason of custom and regulation, may mean the waters of navigable streams and the Great Lakes. On the other hand, a vessel may not be technically "at sea" although navigating the waters of the ocean. The meaning is controlled entirely by the fact as to whether a vessel is in or out of commission. Sea pay is now and always has been paid to officers attached to a vessel regularly commissioned for sea service. Although the intent of the law, and the Navy regulation having the force of law, is that sea pay should be given to such officers as shall be engaged in active duty at sea, such general purpose in special cases, and even in classes of cases, is made to yield to the exigencies of the service.

The primary fact to be determined is whether the vessel is in commission, and to that fact the pay of the officers is subservient, whatever may be the character of their duties. Training ships may be either in or out of commission. Practice ships may by the same order be in commission whilst on a cruise and out of commission at a certain naval station, and the sea pay of the officers be governed thereby. The same rule may apply to vessels attached to the Coast Survey. The duties of officers attached to merchant and revenue vessels may be as arduous or more arduous than those on board ships of war on the high seas, and yet such vessels, not being in commission,

the officers are not entitled to sea pay. The duties of a naval officer may keep him "at sea," passing from one vessel in commission to another, and yet if not attached to any special vessel he is not entitled to sea pay. *Carpenter's Case* (15 C. Cls., 247.) If the ruling of the court below in the present case is sustained, a complete and thorough revision of regulations established for the governance of of the Navy, founded upon the experience of more than a century, will be required.

The importance of a correct solution of the question involved in this case is therefore obvious.

It was assumed, in the opinion rendered by the court below, that the question was solely involved in the construction of two statutes, viz:

Extract from Revised Statutes section 1556, as follows:

> Lieutenants after five years from such date [date of commission], when at sea, $2,600; on shore duty, $2,200; on leave or waiting orders, $1,800.

Revised Statutes, 1571, as follows:

> No service should be required as sea service except such as shall be performed at sea, under the orders of a Department, and the vessels employed by authority of law.

Under the construction of these statutes given by the court, the following Navy regulation is held not to be in conformity with law:

Navy Regulations of 1876:

> Duty on board a sea-going vessel of the Navy in commission, on board a practice ship at sea, or on board a Coast Survey vessel actually employed at sea, will be regarded by the Department as sea service.

Whilst it is admitted that these statutes must be construed in connection with other laws and regulations and instructions of the Navy Department having the force of law, it is at the same time urged that in any view of the matter the court below was in error. "When at sea" in section 1556 means when in "sea service." It is placed in the same clause of the statute in apposition to "shore duty." In the earlier statutes (4 Stat. L., 755) it is denominated "sea service." Construed in connection with section 1571 it can have no other reasonable meaning. Such meaning seems to have been qualifiedly admitted in the opinion of the court, although at the same time the meaning of the term "at sea" is discussed and defined with as much care as if such meaning were relevant to the issue. (Rec., pp. 7 and 8.) If section 1556 should be construed alone, and independent of any other statute or regulation on the subject, it is admitted that it would be important to define the term "at sea," but in the present case it is submitted that it is not. "At sea" in the statute means at "sea service," and what is meant by "sea service" in the American Navy, is the question to be determined. How shall it be determined?

The court below hold:

> Section 1571 was intended by Congress to define what is sea service, and it is not reserved to the Secretary of the Navy to perform that duty by regulation. If the section does not perform the function of definition in the clearest light, it is reserved for the courts * * * to gather, if possible, the purpose and will of the legislature from the best and highest sources of information.

In this the court is in error:

(1) That section 1571 defines what is "sea service."

(2) That the Secretary of the Navy has no power by regulation to define what is "sea service."

(3) That it is the province of the courts alone to construe an ambiguous statute.

Section 1571 limits the power of the Secretary of the Navy to make by regulation any duty "sea service" beyond that prescribed in the statute, but it does not, either by direction or implication, define such service. Within the limits prescribed the regulation of the Department has the force and effect of law.

As an example of its application: An officer attached to a vessel in commission has always been regarded by the Department as on sea service and entitled to sea pay. An officer on shore duty at Washington might be ordered to a vessel in the China seas. Upon the receipt of his orders he is in a qualified sense attached to a vessel in commission. In order to prevent, in such and like cases, the demand and payment of sea pay, by section 1571, sea service was limited to service "performed at sea," &c.

It is no part of the duty of a court to construe laws except so far as such construction may be necessary to determine a case at issue. The presumption is that the meaning of a law is obvious, and if obvious no construction by a court is necessary. *Thornley* vs. *The United States*, 113 U. S., 113, and cases therein cited.

If statutes relate to a Department of the Government it is the duty of such Department to execute such statutes according to their obvious meaning. If there is any doubt as to the meaning, application is not made to the court for

an opinion, except so far as a special case may involve the construction, but to the Attorney-General. The construction given to a statute by those charged with the duty of executing it ought not to be overruled by the courts without cogent reasons. (*United States* vs. *Moore*, 95 U. S., 760, 763; *Brown* vs. *United States*, 113 U. S., 571.) When the law is doubtful and ambiguous the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect. (*Edwards* vs. *Darby*, 12 Wheat., 206; *Atkins* vs. *Disintegrating Company*, 18 Wall., 272; *Smith* vs. *Fiske*, 23 Wall., 374; *United States* vs. *Pugh*, 99 U. S., 265.)

In determining the meaning of the term "sea service" in the American Navy, the custom and usage of the naval establishment, together with the orders of the Secretary of the Navy, with instructions and regulations made in conformity with law, are entitled to great respect by the court and may tend to aid not only in the interpretation to be given to sections 1556 and 1571, but may also solve the question as to whether the Naval Regulations of 1876, overruled by the court below, are in conformity with law.

The original power of the Secretary of the Navy, in addition to his general powers as the head of a Department, is defined in Revised Statutes, section 417, act of 30th April, chapter 35; Statutes at Large, volume 1, page 553; 20th June, 1874, chapter 339, volume 18, page 121, as follows:

> The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials and

the construction, armament, equipment, and *employment of vessels of war, as well as other matters connected with the naval establishment.*

It cannot be doubted that under the provisions of this law it is within the power of the Secretary of the Navy, with the approval of the President, to declare a vessel in or out of commission as well as to designate the character of the employment of the vessel. It also follows that he has the power, for the purpose of efficient organization, to classify the employment, subject to existing laws.

In 1835 (4 Stat. L., p. 755) a distinction was made between the pay of officers on "sea service" and other duties.

In the year 1843 the following order was issued by the Secretary of the Navy:

> NAVY DEPARTMENT, *November* 1, 1843.
>
> The receiving ships at the several stations are not to be considered "vessels in commission for sea service," except, as may sometimes be the case, while going from one port to another.
>
> DAVID HENSHAW,
> *Secretary of the Navy.*
>
> (Naval Register, 1860, p. 146.)

It was held by the Second Comptroller that receiving vessels were not to be regarded as vessels in commission for sea service, and that consequently the officers are not entitled to sea pay, nor to rations allowed to officers on sea duty. (Digest of Second Comptroller's Opinions of 1853, par. 561.)

This opinion is carried into Comptroller's Digest of 1869, Par. 1840.

NAVY DEPARTMENT, *July* 23, 1849.

Officers of the Navy while attached to vessels of the Coast Survey in sea service will be considered as on sea service, and entitled to sea pay.

Vessels of the Coast Survey will be considered as in sea service only while actually employed as vessels of the Coast Survey.

WM. BALLARD PRESTON.

(Navy Register, 1860, p. 1852.)

The following is a copy of a note printed in the Navy Register of 1859 and 1860:

NOTE.—The sea and other service affixed to the names of officers in the Register is computed to the 1st of January, 1859. As a general rule the "sea service" with which an officer is credited is for duty performed under orders from the Department as part of the complement of a vessel of war belonging to the Navy in commission for sea service. Officers on the Coast Survey are allowed sea service for the time they are actually afloat. No credit is given for service in revenue and merchant vessels. In the column "unemployed" is included the time between the date of the warrant, and date of the first order from the Department for service.

The naval ship Constitution, at the Naval Academy, not being in commission for sea service, sea pay and rations are not allowed. (Letter from Navy Department to Fourth Auditor, November 1, 1861; Campbell's new book, p. 10.)

It will be observed from the foregoing that, prior to 1860, the essential to pay for "sea service" was that the officer entitled to such pay should be attached to a vessel in commission.

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It will be further observed that an officer might be actually in service at sea, as on board a receiving ship, merchant or revenue vessel, a practice ship, a vessel of the Coast Survey not actually employed, and yet not be entitled to sea pay, although performing sea duty.

It was in this condition of the service that the *Act of* 11th June, 1860 (12 Stat. L., 565), afterwards incorporated in the Revised Statutes as section 1571, was enacted. The purpose of the law was not to increase the number of those entitled to pay for "sea service" at that time, nor to limit the power of the Secretary of the Navy in declaring a vessel out of commission, nor to define the meaning of sea service; on the contrary, the evident intent of the act was to limit the sea pay of an officer, attached to a vessel in commission, to a time when he was in the performance of duties on board such vessel.

Revised Statutes, section 1547, is as follows:

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

By this act the right of the Secretary of the Navy, by order and instruction, to define the meaning of "sea service" as something independent of the literal meaning of the term "at sea," and to limit "sea pay" only to "sea service" so defined, is recognized. Such regulations have the force of law. (*Gratiot* vs. *United States*, 4 How., 80; *Ex parte Reed*, 100 U. S., 13.)

In the opinion of the court below it is held that the

above-cited cases have no application to the present issue, because "by an examination * * * it will be seen that the regulations referred to in both these cases were in relation to a different subject-matter than the one embraced in the regulation in the case at bar."

Admitting that fact, it is nevertheless claimed that the decisions of this court in these cases were general in their expressions as to the force and effect of all the regulations. In the *Gratiot Case, supra*, it was held, viz:

> As to the Army regulations this court has too repeatedly said that they have the force of law to make it proper to discuss that point anew, and such of them as were assailed in the case by counsel, as not warranted by law, are as obligatory as any of the rest.

This case was cited and affirmed in *Ex parte Reed, supra*, as showing the parallel force of Navy regulations.

It is not claimed by appellant that the regulations of the Navy must not be in conformity with existing laws, but it is submitted that the orders, &c., issued prior to 1862 have been legalized by act of 14th July, 1862, *supra*, section 1547, Revised Statutes, and that all subsequent orders and regulations, &c., in conformity therewith and existing laws, have the force of law.

The regulation of 1876 at issue, and at present in force, it is submitted, is in all essential respects the same as the regulation existing prior to 1862.

That such regulation in any respect is in contravention of the power of Congress to fix the salaries of officers, as claimed by the court, is respectfully denied. Congress fixes the pay of the officer at sea, on shore duty, and on leave, &c. What is "at sea," "shore duty," and "leave,

&c.," is defined by regulation. In the governance of the Navy the Secretary assigns the officer to duty subject to the regulations.

The right in the American Navy to give a meaning to "sea service," not warranted by the literal meaning of the term "at sea," is still asserted by the Navy Department. In illustration is cited, Regulations of 1876, pages 123, 124, as follows:

> When an officer, attached to a vessel for sea service, enters a hospital for treatment, he shall continue to receive pay for three months, unless sooner detached.
>
> An officer attached to a vessel for sea service who receives from the Department a leave of absence on account of ill health, is entitled to sea pay for three months, and then to other duty pay until he reports or is detached from his vessel.
>
> Officers of the Navy attached to vessels employed under the orders of the Department in active service on rivers and lakes are entitled to sea pay as well as rations.
>
> A temporary leave of absence does not detach an officer from duty or affect his pay.
>
> Officers temporarily absent from the vessels to which they are attached, in attendance upon a civil court or court martial, are entitled to sea pay.

From the foregoing it is claimed:

When the New Hampshire was in commission for "sea service," and claimant was attached thereto, he received sea pay and rations. When the New Hampshire was put out of commission for "sea service" claimant received the rate of pay to which he was entitled for shore duty.

above-cited cases have no application to the present issue, because "by an examination * * * it will be seen that the regulations referred to in both these cases were in relation to a different subject-matter than the one embraced in the regulation in the case at bar."

Admitting that fact, it is nevertheless claimed that the decisions of this court in these cases were general in their expressions as to the force and effect of all the regulations. In the *Gratiot Case*, *supra*, it was held, viz:

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It is not claimed by appellant that the regulations of the Navy must not be in conformity with existing laws, but it is submitted that the orders, &c., issued prior to 1862 have been legalized by act of 14th July, 1862, *supra*, section 1547, Revised Statutes, and that all subsequent orders and regulations, &c., in conformity therewith and existing laws, have the force of law.

The regulation of 1876 at issue, and at present in force, it is submitted, is in all essential respects the same as the regulation existing prior to 1862.

That such regulation in any respect is in contravention of the power of Congress to fix the salaries of officers, as claimed by the court, is respectfully denied. Congress fixes the pay of the officer at sea, on shore duty, and on leave, &c. What is "at sea," "shore duty," and "leave,

&c.," is defined by regulation. In the governance of the Navy the Secretary assigns the officer to duty subject to the regulations.

The right in the American Navy to give a meaning to "sea service," not warranted by the literal meaning of the term "at sea," is still asserted by the Navy Department. In illustration is cited, Regulations of 1876, pages 123, 124, as follows:

> When an officer, attached to a vessel for sea service, enters a hospital for treatment, he shall continue to receive pay for three months, unless sooner detached.
>
> An officer attached to a vessel for sea service who receives from the Department a leave of absence on account of ill health, is entitled to sea pay for three months, and then to other duty pay until he reports or is detached from his vessel.
>
> Officers of the Navy attached to vessels employed under the orders of the Department in active service on rivers and lakes are entitled to sea pay as well as rations.
>
> A temporary leave of absence does not detach an officer from duty or affect his pay.
>
> Officers temporarily absent from the vessels to which they are attached, in attendance upon a civil court or court martial, are entitled to sea pay.

From the foregoing it is claimed:

When the New Hampshire was in commission for "sea service," and claimant was attached thereto, he received sea pay and rations. When the New Hampshire was put out of commission for "sea service" claimant received the rate of pay to which he was entitled for shore duty.

He has been paid in accordance with a custom always recognized in the Navy Department and enforced by regulation.

Whilst in "sea service" and out of commission during the period named, the New Hampshire has been unseaworthy and anchored in Narragansett Bay. To all intents and purposes she was a fixture—a house at sea. Except in name she was a receiving ship. The power of the Secretary of the Navy to designate the character of the service by ordering a vessel in or out of commission has never heretofore been disputed. The meaning of sea pay as applied to vessels in commission for "sea service" has had a uniform recognition.

The terms "sea pay" and "sea-pay service" have a distinct meaning in the American Navy. When the terms "at sea" and "sea service" are used in the Statutes, such terms should be defined according to the usage and custom of the Navy.

If the court below is sustained in their opinion the whole theory not only of sea pay but of naval regulations will be overthrown, and thorough revision of naval rules and governance be required. This court is respectfully asked to reverse the decree of the court below and direct that claimant's petition be dismissed.

A. H. GARLAND,
Attorney-General.

F. P. DEWEES,
Assistant Attorney.

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In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANT,
vs.
JOSHUA BISHOP.
} No. 1029.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF OF APPELLANT.

In the Supreme Court of the United States

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANT,
vs.
JOSHUA BISHOP. } No. 1029.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This is an appeal from a judgment rendered by the Court of Claims in favor of Joshua Bishop against the United States for the sum of $816.58.

In many of the facts this case is of like character with that of United States, appellant, *vs.* F. M. Symonds, in this court on appeal, and presented herewith for the consideration of this court.

Joshua Bishop is a lieutenant-commander in the Navy of more than four years' service as such. He is serving on board of the U. S. S. Minnesota, stationed in the New York Harbor. His service on this ship commenced on the 18th of April, 1884, when, in obedience to orders, he reported for duty. Since last-mentioned date claimant

has been paid in full the shore pay of a lieutenant-commander of more than four years' service—no allowance has been made him for rations or commutation thereof.

By General Order 297, Navy Department, July 7, 1882, the New Hampshire, the Minnesota, the Intrepid, and the Alarm were placed out of commission for sea service. Prior to that date the officers attached to the New Hampshire received sea pay and commutation of rations; after that only shore pay and no rations or commutation thereof.

The New Hampshire is one of the training ships of the United States Navy. She is now, and has been, stationed in New York Harbor since claimant reported for duty in April, 1884. Her machinery and equipments are in order and she is seaworthy.

The duty of officers attached to training ships is more arduous and confining than those of officers of similar grade upon vessels in foreign waters.

The claimant was the executive officer of the Minnesota, and as such performed the regular and usual duties of an executive officer. Upon this state of facts the court below affirmed the principles of law as already decided in the Symonds Case, and rendered judgment in favor of the claimant as above stated.

The position assumed by the claimant is that the duties performed by him on board the Minnesota were not only as arduous, but were of like character to those performed by an officer of like grade attached to a vessel in commission for sea service in a foreign port. He claims that the rate of pay is dependent upon the character of the duties

rendered, and not upon the fact as to whether he may or may not be attached to a vessel of the Navy in or out of commission for sea service.

Claimant has been paid, in conformity with a regulation of the Navy Department, as follows:

Navy Regulations of 1876, p. 85, par. 38:

> Duty on board a sea-going vessel of the Navy in commission, on board a practice ship at sea, on board a Coast Survey vessel actually employed at sea, will be regarded by the Department as sea service.

This regulation is held by the court as not in conformity with law. The proposition of claimant, that the rate of pay is not dependent upon the character of the duties performed, was affirmed by the court below. The power of the Secretary of the Navy to affect the rate of pay by placing a vessel in or out of commission for sea service was denied. In the Symonds Case, referred to in the opinion of the court, the following statutes were construed:

Clause in section 1556, Revised Statutes:

> Lieutenants during the first five years after date of commission, when at sea, two thousand four hundred dollars; on shore duty, two thousand dollars; on leave or waiting orders, one thousand six hundred dollars; after five years from such date, when at sea, two thousand six hundred dollars; on leave or waiting orders, one thousand eight hundred dollars.

Section 1571, Revised Statutes:

> No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law.

Section 1578, Revised Statutes:

> All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a sea-going vessel.

Section 1547, Revised Statutes:

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alteratious adopted in the same manner.

The clause of section 1556, Revised Statutes, applicable to the present case, is as follows:

> Lieutenant-commanders during the first four years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave or waiting orders, two thousand dollars; after four years from such date, when at sea, three thousand dollars; on shore duty, two thousand six hundred dollars; on leave or waiting orders, one thousand eight hundred dollars.

ASSIGNMENT OF ERRORS.

The court below erred, viz:

(1) In deciding as a conclusion of law that the claimant is entitled to recover the sum of $816.58.

(2) In holding that claimant is entitled to recover any amount upon the facts as found.

(3) In rendering judgment in favor of claimant.

BRIEF OF ARGUMENT.

The principles of law at issue in this case are the same as those involved in the Symonds Case, presented herewith on appeal.

The main question presented in both cases is as to whether Navy Regulation of 1876, *supra*, p. 85, par. 38, is in conformity with law.

Claimant contends that as his duties on board the Minnesota, lying in New York Harbor, were of a like character to those of an officer on board a vessel of the Navy in commission for sea service lying in foreign port his pay should be the same. That as in both cases the duty is performed "at sea" both are equally entitled to sea pay.

The appellant, on the other hand, claims that in the statutes applicable "at sea" means in "sea service." That whether "at sea" or "sea service" is referred to, in a law, such reference is made with the meaning given to such terms in the American Navy.

That prior to 1862 "sea service" was limited by Navy regulation only to those attached to a vessel in commission for sea service. That such meaning so given by regulation was ratified by section 1547, Revised Statutes, *supra*. That the present Navy regulation relative to "sea service" is substantially the same as that in force prior to 1862. That the present regulation is in conformity with the custom, usage, and regulation of the Navy since 1835, when a difference in the rate of pay for "sea service" and "other duty" for naval officers was first established by law. (4 Stat. L., 755).

That the opinion of the court below is in direct contra-

vention of the theory of the naval establishment, and if sustained would necessitate an entire revision of the rules at present in force relative to naval pay.

The argument of appellant in the Symonds Case, presented herewith, is referred to the consideration of the court in the case at issue.

The facts in the two cases differ in these particulars:

(1) Symonds was a lieutenant in service on board the United States training ship New Hampshire, in Narragansett Bay. Bishop was a lieutenant-commander and the executive officer on board the training ship Minnesota, in New York Harbor.

(2.) The New Hampshire, during the entire period of Symonds's service, was unseaworthy. The Minnesota was seaworthy during the entire period of Bishop's service, and could, with ordinary preparation, have been sent to sea.

(3) When Symonds was first attached to the New Hampshire that vessel was in commission for sea service. While he was so attached such vessel was put out of commission. During the entire period Bishop was attached to the Minnesota such vessel was out of commission.

The difference in the facts of the two cases in no respect affects the view of the matter submitted by appellant. The court is respectfully asked to reverse the judgment and decree of the court below, and to direct that claimant's petition be dismissed.

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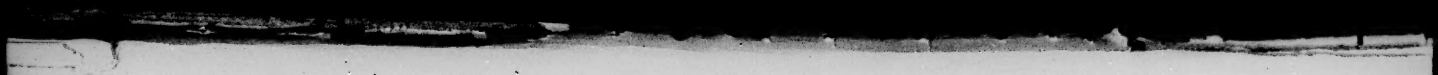

120-46

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES,
Appellants,
vs.
F. M. SYMONDS,
Appellee.
No. 1,023.

THE UNITED STATES,
Appellants,
vs.
JOSHUA BISHOP,
Appellee.
No. 1,029.

STATEMENT AND BRIEF OF APPELLEES.

JOHN PAUL JONES,
ROBERT B. LINES,
Counsel.

MILANS, PR.

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, *Appellants*, *vs.* F. M. SYMONDS, *Appellee.*	No. 1,023.
THE UNITED STATES, *Appellants*, *vs.* JOSHUA BISHOP, *Appellee.*	No. 1,029.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S STATEMENT.

These two cases involve the same questions, and while the Attorney General has filed a separate brief in each, for convenience, we beg leave to submit our views upon both cases together.

These appellees, officers of the Navy, were under orders of the Secretary of the Navy, attached to, and serving respectively on board the practice or training ships New Hampshire and Minnesota, the former in Narragansett Bay and the latter in New York Harbor.

Section 1,556, R. S., fixes the pay of a lieutenant of the length of service of appellee, Symonds, at $2,600,

per annum, "when at sea," when on "shore duty" at $2,200; and that of a lieutenant commander of the length of service of appellee, Bishop at $3,000, "when at sea," and $2,600, "when on shore duty."

Section 1,578 allows all officers a ration or commutation therefor "while at sea or attached to a sea-going vessel," and Section 1,585 fixes thirty cents as the commutation price of a navy ration.

For a portion of his service on the U. S. S. New Hampshire, appellee, Symonds, was paid only shore pay, and was allowed neither a ration nor commutation therefor.

Appellee Bishop, was paid only shore pay, without a ration or commutation therefor, for the whole period of his service on the U. S. S. Minnesota.

The court below decided that appellees were entitled to "sea pay" and commutation of rations for the whole of the period of their service on said vessels, and gave judgment respectively, for the sums of $1,122.29, and $816.58.

BRIEF.

If the sections of law above quoted stood alone, the case would be plain. The court below has found, that these ships were "at sea" within the judicial and executive definition of that term adopted by this court in Peyroux, *et. al.*, *vs.* Howard, and Varion (7 Pet. 342), by Justice Story in DeLovio *vs.* Boit (2 Gall., 428), and by Attorney General Bates, (10 Ops., 192).

In addition to these authorities the court is respectfully referred to –

Harg. tract, Ch., 4, p. 10.
Angell on Tide Waters, p. 4.
Smith's Cons., Stats. Sec. 588, *et. seq.*
United States *vs.* Wiltberger, 5 Wheat. 76.
United States *vs.* Robinson, 4 Mason, 307.
Baker *vs.* Hoag, 7 N. Y., 561.

The exact words "at sea," when used in English and American Statutes, have been construed by the courts.

An English statute (1 Vict., C. 26, Sec. 11,) provides for the probate of nuncupative wills, made by sailors "*at sea.*"

In *Goods of McMurdo* (L. R., 1; P. & D., 540) it was held that a nuncupative will made by McMurdo, a mate on the "Excellent," when that vessel was laid up in Portsmouth harbor with no immediate prospect of sailing, was made "at sea," and it was admitted to probate. And a letter written and mailed by the master of a vessel whilst in port was held to be a nuncupative will as being made "at sea," (Parker *in re*, 2 Sw. and Tr., 375.)

A New York statute is as follows:

SEC. 19 (sec. 22). "No nuncupative or unwritten will bequeathing estate shall be valid, unless made by a soldier while in actual military service, or by a mariner while *at sea.*" (R. S., Ed. 1852, p. 243.)

In Hubbard *v.* Hubbard, (8 N. Y., 4 Seld., 196,) it was held that an unwritten will made by a seaman on a vessel at anchor in Delaware Bay was within the statute.

The English statute of 1389 (13 Rich. II, Ch. 5,) providing "that the admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea" gave rise to a long contest, (DeLovio *vs.* Boit, *supra*) between the admiralty and common law courts for jurisdiction over ports and havens, in which contest the contention of the admiralty was supported by Spelman and Exton (Reliq., Ad. Jur., 226—Mar. Dic. 80.)

But when our constitution gave to United States courts cognizance of admiralty and maritime causes, they early assumed the jurisdiction over ports and havens, contended for by the English Courts of Ad-

miralty under the statute above quoted, and later extended it to lakes and navigable rivers.

The Thomas Jefferson, 10 Wheat., 428.
Thackeray *et al. vs.* The Farmer, 2 Gilp., 524.
Peyroux *et al. vs.* Howard & Varian, (*supra.*)
The Genesee Chief, (12 How., 443.)
The Commerce, (1 Black, 574.)
The Ad., Hine *vs.* Trevor, (4 Wall., 555.)
The Eagle, (8 Wall., 15.)

That the word "sea" wherever used in American legislation includes ports, havens, and navigable waters is, therefore, no longer open to discussion. Whenever they are intended to be excluded, it is done expressly By reference to chapter 3, of Title LXX, R. S., p. 1,037, Secs. 5,339, *et seq*, it will be seen that when the open ocean or "main sea" is meant, the words "high seas" only are used, but when the "sea" is meant, the words "high seas" are extended by the addition of the words "river, harbor, basin or bay," &c., or the simple words "the sea" are used. For instance, Sec. 5,368, fixes a punishment for piracy on the "high seas," as it is defined by international law, but Sec. 5,374, makes it piracy for the citizens of foreign States to make war upon the Government of the United States "on the sea," under certain circumstances.

It cannot be contended that if these circumstances had concurred, and the Minnesota or the New Hampshire had been the object of attack, as they lay or cruised in New York harbor or Narragansett bay, the offender could not have been punished, under the provision of this section, upon the theory that the offence was not committed "*on the sea.*"

If, therefore, Secs. 1,556 and 1,578, R. S., entitle officers to sea pay and rations "when at sea," the appellees should have received such pay and rations during the period of their service on the New Hampshire and the Minnesota.

II.

But it is asserted by appellants that those sections are limited by Sec. 1,571, R. S., and by certain orders and regulations of the Navy Department, issued in conformity therewith.

Sec. 1,571, is as follows:

"No service shall be regarded as sea service, except such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law."

This section *defining sea service* says nothing about pay, and there are other subjects to which it may very well be presumed to relate. For instance, an examination of any annual Navy register will show that officers are credited in appropriate columns, with their service upon sea and shore duty, and upon waiting orders, and appellants, in the early part of their brief, cite a note from the Naval Register of 1860, showing this fact. It is well known that assignments to duty are made, in turn, with reference to the amount of each character of service, previously performed by the officers.

But admitting that Sec. 1571 limits an officer's right to sea pay, under Sec. 1556, that limit has clearly no application to the cases at bar. Section 1556, as well as Sec. 1571, requires that the service for which sea pay shall be allowed shall be performed "at sea." The only difference between the two sections is that the latter requires the service also to be performed "under the orders of a Department and in vessels employed by authority of law." Thus if an officer should be at sea on a public vessel without orders, or at sea under orders, but not on a public vessel (as when travelling to join his ship,) it might be contended that, under Section 1571, he had no right to sea pay.

An examination of the opinion of Atty. Genl. Bates, (*supra*), will show that its purport was to deny officers sea pay in the case last cited. But in the cases at bar, the officers fulfilled all the requirements of Section 1571, admitting that that section refers to pay, by being at sea on public vessels, and under the orders of the Navy Department. The conclusion that they were entitled to sea pay, could only be avoided, it would seem, by holding that the sea, as well as the officer, was under the orders of the Department. This sort of prerogative has not, it is believed, been asserted since the time of King Canute, and then not successfully.

And yet the appellants, in their brief, maintain that the Secretary has such a prerogative. That is to say, that he has the right, by defining "sea service" to limit the legal signification of the words "at sea" as used in the statutes, and has exercised that right in various orders and regulations.

III.

Of such orders and regulations, there are but two in the record, viz: the regulation of 1876 and the order of 7 July, 1882, though others are alluded to in appellants brief.

These orders are as follows:

Regulation of 1876.

"Duty on board a sea going vessel of the Navy in commission, on board a practice ship *at sea*, or on board a coast survey vessel actually employed at sea, will be regarded by the Department as *sea service*."

GENERAL ORDER } NAVY DEPARTMENT,
No. 297. } WASHINGTON, *July* 7, 1882.

On after the 1st of August next the "New Hampshire," the "Minnesota," the "Intrepid," and the "Alarm," will not be considered as in commission for *sea service*.

WM. E. CHANDLER,
Secretary of the Navy.

Neither of these orders attempt in express words to fix the pay of any officer, but merely define what the Navy Department would regard as "sea service." They may therefore, very well be supposed to have been intended to apply only to that credit for sea service on the Navy Register which affects an officers assignment to duty. There is nothing in the record to indicate that the Secretary, in issuing them, had the least idea of effecting the pay of officers serving on the vessels described in them.

Conceding that the accounting officers of the Treasury are bound to accept the construction placed by the Secretary upon the statutes regulating the pay of the Navy (which is in direct conflict with the provisions of Sec's 191, 273 and 277, R. S., giving them final power to adjudicate all accounts arising in the Navy Department until recourse is had to the courts), we submit that they simply misinterpreted the order of 1882.

As to the regulation of 1876, the interpretation placed upon it, by the accounting officers, in allowing or denying sea pay, for service or practice on training ships at sea, but not in commission, is neither shown in the record or stated in appellant's brief. But the order itself, in defining what shall be considered as sea service, on sea going vessels, specifies that they must be "*in commission*," but credits officers on practice or training ships with sea service when such vessels are "at sea," whether in commission or not. These

are the exact words used in Sections 1,556 and 1,571. The inference is that the accounting officers, even if they regarded the regulation of 1876 as affecting pay, allowed sea pay to the officers of practice ships.

If this be so, there was no reason for cutting it off from the officers of the New Hampshire and Minnesota, simply because the Secretary of the Navy, in July, 1882, notified them that their service on these vessels would no longer be considered as entitling them to credit for sea service, in the administration of his department.

Credit for sea service is a part of a naval officer's military record; it is an element in fixing the standing of a sailor, as it is necessarily so in determining his proficiency in his profession, and thus influences his assignment to duty. This credit is, therefore, properly within the control of the head of the Navy Department. But pay is fixed by statute, for inferior as well as for excellent officers, to be controlled only by the character of duty performed, without reference to professional qualifications. No inference can be drawn from the words of the orders of 1876 and 1882, that they were intended to indirectly regulate pay. But if they were so intended, we insist that they were clearly illegal.

The appellants contend broadly, that the secretary has the power to deprive the officers of any vessel, no matter in what waters she may be, of sea pay, by saying that she will not be "considered as in commission for sea service." If he can do so in one case, he can issue a general order thus affecting, at the same time, all naval vessels, and so practically wipe sea pay from the statute books. This discretion was never vested in him by Congress. The only power which the Executive has to change or vary naval pay, is confined to that of petty officers and seamen, by Section 1,569, R. S.

Against the contention of the appellants, we cannot refrain from quoting a few words from their brief in

the case of the U. S. *vs.* Philbrick, No. 1,032, this day submitted.

"The pay of naval officers is fixed by statute. No power exists in the Secretary of the Navy, to increase or diminish it. The powers of all officers, from the President down, are limited by law."

"As the pay of Naval officers is fixed by statute, without any authority vested in the Secretary of the Navy to increase or diminish the pay so fixed by a direct order he cannot lawfully, as attempted in General order No. 75 accomplish the result by any indirect order."

IV.

The appellants, in this brief, quote a number of other orders and regulations, which it is claimed, show that the Navy Department has, from time to time, asserted a control over the matter of pay, independent of the character of duty performed by the officers.

None of these are in the records, but if the court see fit to take judicial notice of them, it will find with regard to the earlier ones:

First. That there is nothing to show the location and circumstances of the vessels to which they were intended to apply.

Second. None of the vessels mentioned were practice ships, but those to be effected were specified, as receiving, coast survey, revenue and merchant vessels.

Third. They seem to have been considered of such doubtful legality as to have required Congressional ratification, as stated in appellant's brief, by the Act of July 14, 1862, (12 Stats., 565.) And they have since been omitted from the regulations of 1876.

In a case like the present, the Navy Department was advised of its lack of power as early as 1857 by Attorney General Cushing. The pay of pursers serving on frigates, had been fixed by statute. After some alterations the Macedonian, which had previously been rated as a frigate, was placed by the Navy Department, in another classification, and as a consequence the pay of her purser was reduced. The Attorney General held that these alterations did not change her character according to received definitions, and this being so, although the department might, for other purposes, change her rating on the roster of ships, such change could not affect the pay of officers serving on her.

In the opinion we find the following very pertinent language:

"It was the intention of the law, undoubtedly, to fix definitely the compensation of pursers, not only as against any capability of enlarging it on their part, but also as against any discretion over it on the part of the Executive. This it undertook to effect by referring the pay to classes of vessels by name, which implies that the names adopted had, at the time, a received signification in fact, which signification constitutes the legal meaning of the language, now, as well as then.

If it were otherwise, it would be in the power of the administrators of a law, by means of new definitions to defeat all the purposes of the legislator. Thus in the present case, if the application of the names of the statute is at the discretion of the department, then the rate of compensation of pursers is at its discretion. Such cannot be the presumed intention of Congress," (8 Ops., 507.)

From the time this opinion was rendered, down to 1876, there is but one order of the Navy Department, cited by the appellants, which seems to assert a right to regulate pay, viz: the order of 1861, relating to the

Constitution which, for anything that appears to the contrary, may have been laid up in ordinary, with only one officer, living on shore, to take care of her. The note from the naval register of 1860, if it be considered an order, on the face of it relates only to credit for "sea service," on that register, as before stated.

It is fair to presume, therefore, that for a long time, the Navy Department, acting on the sound advice of Attorney General, Cushing, refrained from attempting to regulate pay, either directly or indirectly.

With respect to the paragraphs quoted from the Regulations of 1876, which apparently seek to enlarge the scope of Section 1,556, by allowing sea pay to officers temporarily absent from their vessels, we need express no opinion, as no case has arisen involving their legality. The same may be said in reply to the argument *ab inconveniente* of the appellants, that an affirmance of the judgment below, would destroy all existing regulations touching Receiving, Coast Survey, Revenue and Merchant Ships. Whenever a case arises under such regulations, (whatever they may be, for they are not cited,) it will be time to consider them.

At present we see no ground whatever for the assertion that judgment in favor of the appellees would interfere, even with the regulation of 1876 which is in the record. Officers would continue to receive their credit for sea service under that regulation, just as they do now. Nor would such judgment effect even Secretary Chandler's order of 1882, when properly construed. It would neither put the Minnesota and New Hampshire back in commission, nor compel the department to regard the service of their officers as sea service, in fixing credit therefor. Still less would it interfere with the Secretary's power to put vessels in or out of commission hereafter.

In its opinion the court below has stated that "Congress, for reasons which will most readily occur to every person, have made a distinction in pay between the officer at sea and on shore."

It is sufficient to refer only to the controlling one of such reasons, viz: the increased expenses incident to service "at sea." The findings in these cases show that the officers on the New Hampshire and the Minnesota, besides being subjected to all the routine and discipline of ship life, are compelled to keep up two establishments, as they are not, of course, permitted to have their families with them.

This increased pay is to meet the extraordinary expenses which necessarily follows such separation, as well as to compensate for their arduous duties, which it is shown is more confining and exacting on these vessels, than on vessels cruising in foreign waters.

It is respectfully submitted that the judgment of the court below should be affirmed.

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